



Billing code 4810-25-P
DEPARTMENT OF THE TREASURY

48 CFR Parts 1032 and 1052

Department of the Treasury Acquisition Regulations; Incremental Funding of Fixed-Price, Time-and-Material or Labor-Hour Contracts during a Continuing Resolution

AGENCY: Department of the Treasury.

ACTION: Final rule.

SUMMARY: This final rule amends the Department of Treasury Acquisition Regulation (DTAR) for the purposes of providing acquisition policy for incremental funding of Fixed-Price, Time-and-Material or Labor-Hour contracts during a continuing resolution.

DATES: Effective date: [INSERT DATE THAT IS 30 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER]

FOR FURTHER INFORMATION CONTACT: Thomas O'Linn, Procurement Analyst, Office of the Procurement Executive, at (202) 622-2092.

SUPPLEMENTARY INFORMATION:

Background

The DTAR, which supplements the Federal Acquisition Regulation (FAR), is codified at 48 CFR Chapter 10.

The Anti-Deficiency Act, 31 U.S.C 1341 and the FAR section 32.702, state that no officer or employee of the government may create or authorize an obligation in excess of the

funds available, or in advance of appropriations unless otherwise authorized by law. A continuing resolution (CR) provides funding for continuing projects or activities that were conducted in the prior fiscal year for which appropriations, funds, or other authority was previously made available.

Each CR is governed by its specific terms. However, amounts available under a CR are frequently insufficient to fully fund contract actions that may be required during its term. No existing contract clause permits partial funding of a contract action awarded during a CR. While other strategies are available to address the need to take contract actions during a CR, these strategies – for example short-term awards – are inefficient and may have other disadvantages.

On July 12, 2016, the Department issued a proposed rule (81 FR 45118) that would establish policies and procedures in order to facilitate successful, timely, and economical execution of Treasury contractual actions during a CR. Specifically, the proposed rule would set forth procedures for using incremental funding for fixed-price, time-and-material and labor-hour contracts during a period in which funds are provided to Treasury Departmental Offices or Bureaus under a CR. Heads of contracting activities may develop necessary supplemental internal procedures as well as guidance to advise potential offerors, offerors and contractors of these policies and procedures.

The comment period for the proposed rule closed on September 12, 2016. No public comments were received. Accordingly, the Department is adopting the proposed rule without substantive change.

Regulatory Planning and Review

This rule is not a significant regulatory action as defined in section 3(f) of Executive Order 12866. Therefore a regulatory assessment is not required.

Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. chapter 6) generally requires agencies to conduct an initial regulatory flexibility analysis and a final regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements, unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities.

It is hereby certified that this rule will not have a significant economic impact on a substantial number of small entities. The rule is intended to make changes to the DTAR that would allow for improvements in continuity when Treasury funding is operating under a CR and should not have significant economic impacts on small entities.

List of Subjects in 48 CFR Parts 1032 and 1052

Government procurement.

Accordingly, the Department of the Treasury amends 48 CFR Chapter 10 as follows:

PART 1032—CONTRACT FINANCING

1. The authority citation for part 1032 continues to read as follows:

Authority: 41 U.S.C. 1707.

2. Add subpart 1032.7 to read as follows:

Subpart 1032.7—Contract Funding

Sec.

1032.770 Incremental funding during a Continuing Resolution.

1032.770-1 Scope of section.

1032.770-2 Definition.

1032.770-3 General.

1032.770-4 Policy.

1032.770-5 Limitations.

1032.770-6 Procedures.

1032.770-7 Clause.

Subpart 1032.7—Contract Funding

1032.770 Incremental funding during a Continuing Resolution.

1032.770-1 Scope of section.

This section provides policy and procedure for using incremental funding for fixed-price, time-and-material and labor-hour contracts during a period in which funds are provided to Treasury Departmental Offices or Bureaus, under a continuing resolution (CR). HCAs may develop necessary supplemental internal procedures as well as guidance to advise potential offerors, offerors and contractors of these policies and procedures. Additionally, Bureaus who receive non-appropriated funds may utilize and tailor these policies and procedures to fit their needs.

1032.770-2 Definition.

“Continuing Resolution” means an appropriation, in the form of a joint resolution, that provides budget authority for federal agencies, specific activities, or both to continue operation until the regular appropriations are enacted. Typically, a continuing resolution is used when legislative action on appropriations is not completed by the beginning of a fiscal year.

1032.770-3 General.

The Anti-Deficiency Act, 31 U.S.C 1341 and FAR 32.702, states that no officer or employee of the Government may create or authorize an obligation in excess of the funds available, or in advance of appropriations unless otherwise authorized by law. A CR provides funding for continuing projects or activities that were conducted in the prior fiscal year for which appropriations, funds, or other authority was previously made available. Each CR is governed by the specific terms in that specific CR (e.g. duration of the CR) and under certain CRs, the funding amounts available for award of contract actions are inadequate to fund the entire

amounts needed for some contract actions.

1032.770-4 Policy.

(a) A fixed-price, time-and-materials or labor-hour contract or order for commercial or non-commercial supplies or severable or non-severable services may be incrementally funded when—

(1) Funds are provided to a Treasury Departmental Office or Bureau under a CR. This includes funds appropriated to a bureau, funds appropriated to another entity that will be directly obligated on a Treasury contract, and funds in a revolving fund or similar account that will be reimbursed by a customer agency funded by a CR;

(2) Sufficient funds are not being allocated from the responsible fiscal authority to fully fund the contract action that is otherwise authorized to be issued;

(3) There is no statutory restriction that would preclude the proposed use of funds;

(4) Funds are available and unexpired, as of the date the funds are obligated;

(5) Assurance is provided by the responsible financial authority that full funding is anticipated once an Appropriation Act is enacted; and

(6) The clause prescribed by 1032.770-7 is incorporated into the contract or order.

(b) Incremental funding may be limited to individual line item(s) or a particular order(s).

1032.770-5 Limitations.

(a) This policy does not apply to contract actions that are not covered by the CR.

(b) If this policy is applied to non-severable services or to supplies, the contracting officer shall take into consideration the business risk to the Government if funding does not become available to fully fund the contract. If the contracting officer determines the use of incremental

funding for non-severable services or supplies is in the best interest of the Government the contracting officer shall ensure the contractor fully understands how the limitations of the Government's liabilities under the contract might impact its ability to perform within the prescribed contract schedule.

1032.770-6 Procedures.

(a) An incrementally funded fixed-price, time-and-materials or labor-hour contract shall be fully funded once funds are available.

(b) The contracting officer shall ensure that sufficient funds are allotted to the contract to cover the total amount payable to the contractor in the event of termination of convenience by the Government.

(c) Upon receipt of the contractor's notice under paragraph (c) of the clause at 1052.232-90, Limitation of Government's Obligation, the contracting officer shall promptly provide written notice to the contractor that the Government is—

(i) Obligating additional funds for continued performance and increasing the Government's limitation of obligation in a specified amount;

(ii) Obligating the full amount of funds needed;

(iii) Terminating for convenience, as applicable, the affected line items or contract; or

(iv) Considering whether to allot additional funds; and

(A) The contractor is entitled by the contract terms to stop work when the Government's limitation of obligation is reached; and

(B) Any costs expended beyond the Government's limitation of obligation are at the contractor's risk.

(d) Upon learning that the contract will receive no further funds by the date provided in the notice under paragraph (c) of the clause at 1052.232-70, Limitation of Government's Obligation,

the contracting officer shall promptly give the contractor written notice of the Government's decision and terminate the affected line items or contract, as applicable, for the convenience of the Government.

1032.770-7 Clause.

The contracting officer shall insert the clause at 1052.232-70, Limitation of Government's Obligation, in

(a) Solicitations and resultant contracts when incremental funding of fixed-price, time-and-material or labor-hour contract via a CR is anticipated; or

(b) Contracts or orders when incremental funding of a fixed-price, time-and-material or labor-hour contract is authorized and the Treasury Departmental Office or Bureau is operating under a CR (see 1032.770-4); and

(c) The CO shall insert the information required in paragraphs (a) and (c) of the clause.

PART 1052—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

3. The authority citation for part 1052 continues to read as follows:

Authority: 41 U.S.C. 1707.

4. Add 1052.232-70 to subpart 1052.2 to read as follows:

1052.232-70 Limitation of Government's obligation.

As prescribed in 1032.770-7, insert the following clause. Contracting officers are authorized, in appropriate cases, to revise paragraph (a) of this clause to specify the work required under the contract, in lieu of using contract line item numbers as well as revise paragraph (c) of this clause to specify a different notification period and percentage. The 30-day period may be varied from 45, 60

to 90 days, and the 75 percent from 75 to 85 percent:

LIMITATION OF GOVERNMENT'S OBLIGATION (NOV 2016)

(a) Funding is not currently available to fully fund this contract due to the Government operating under a continuing resolution (CR). The item(s) listed in the table below are being incrementally funded as described below. The funding allotted to these item(s) is presently available for payment and allotted to this contract. This table will be updated by a modification to the contract when additional funds are made available, if any, to this contract.

| Contract Line Item Number (CLIN) | CLIN Total Price | Funds allotted to the CLIN | Funds required for complete funding of the CLIN |
|---|-------------------------|-----------------------------------|--|
| | \$ | \$ | \$ |
| | \$ | \$ | \$ |
| | \$ | \$ | \$ |
| | \$ | \$ | \$ |
| Totals | \$ | \$ | \$ |

(b) For the incrementally funded item(s) identified in paragraph (a) of this clause, the Contractor agrees to perform up to the point at which the total amount payable by the Government, including any invoice payments to which the Contractor is entitled and reimbursement of authorized termination costs in the event of termination of those item(s) for the Government's convenience, does not exceed the total amount currently obligated to those item(s). The Contractor is not authorized to continue work on these item(s) beyond that point. The Government will not be obligated in any event to reimburse the Contractor in excess of the amount allotted to the line items of the contract regardless of anything to the contrary in any other clause, including but not limited to the clause entitled "Termination for Convenience of the Government" or paragraph (1) entitled "Termination for the Government's Convenience" of the clause at FAR 52.212-4, "Commercial Terms and Conditions- Commercial Items."

(c) Notwithstanding paragraph (h) of this clause, the Contractor shall notify the Contracting Officer in writing at least thirty days prior to the date when, in the Contractor's best judgment, the work will reach the point at which the total amount payable by the Government, including any cost for termination for convenience, will approximate 85 percent of the total amount then allotted to the contract for performance of the item(s) identified in paragraph (a) of this clause. The notification shall state the estimated date when that point will be reached and an estimate of additional funding, if any, needed to continue performance. The notification shall also advise the Contracting Officer of the estimated amount of additional funds required for the timely performance of the item(s) funded pursuant to this contract. If after such notification additional funds are not allotted by the date identified in the Contractor's notification, or by an agreed upon substitute date, the Contracting Officer will terminate any item(s) for which additional funds have not been allotted, pursuant to the terms of this contract authorizing termination for the convenience of the Government. Failure to make the notification required by this paragraph, whether for reasons within or beyond the Contractor's control, will not increase the maximum amount payable to the Contractor under paragraphs (a) and (b) of this clause.

(d) The Government may at any time prior to termination allot additional funds for the

performance of the item(s) identified in paragraph (a) of this clause.

(e) The termination provisions of paragraphs (a) through (h) of this clause do not limit the rights of the Government under the clause entitled "Default" or "Termination for Cause." The provisions of this clause are limited to the work and allotment of funds for the item(s) set forth in paragraph (a) of this clause. This clause no longer applies once the contract is fully funded.

(f) Nothing in this clause affects the right of the Government to terminate this contract pursuant to the Government's termination for convenience terms set forth in this contract.

(g) Nothing in this clause shall be construed as authorization of voluntary services whose acceptance is otherwise prohibited under 31 U.S.C. 1342.

(h) The parties contemplate that the Government will allot funds to this contract from time to time as the need arises and as funds become available. There is no fixed schedule for providing additional funds.

(End of clause)

DATED: November 8, 2016.

Iris B. Cooper,
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Office of the Procurement Executive

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